FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1191

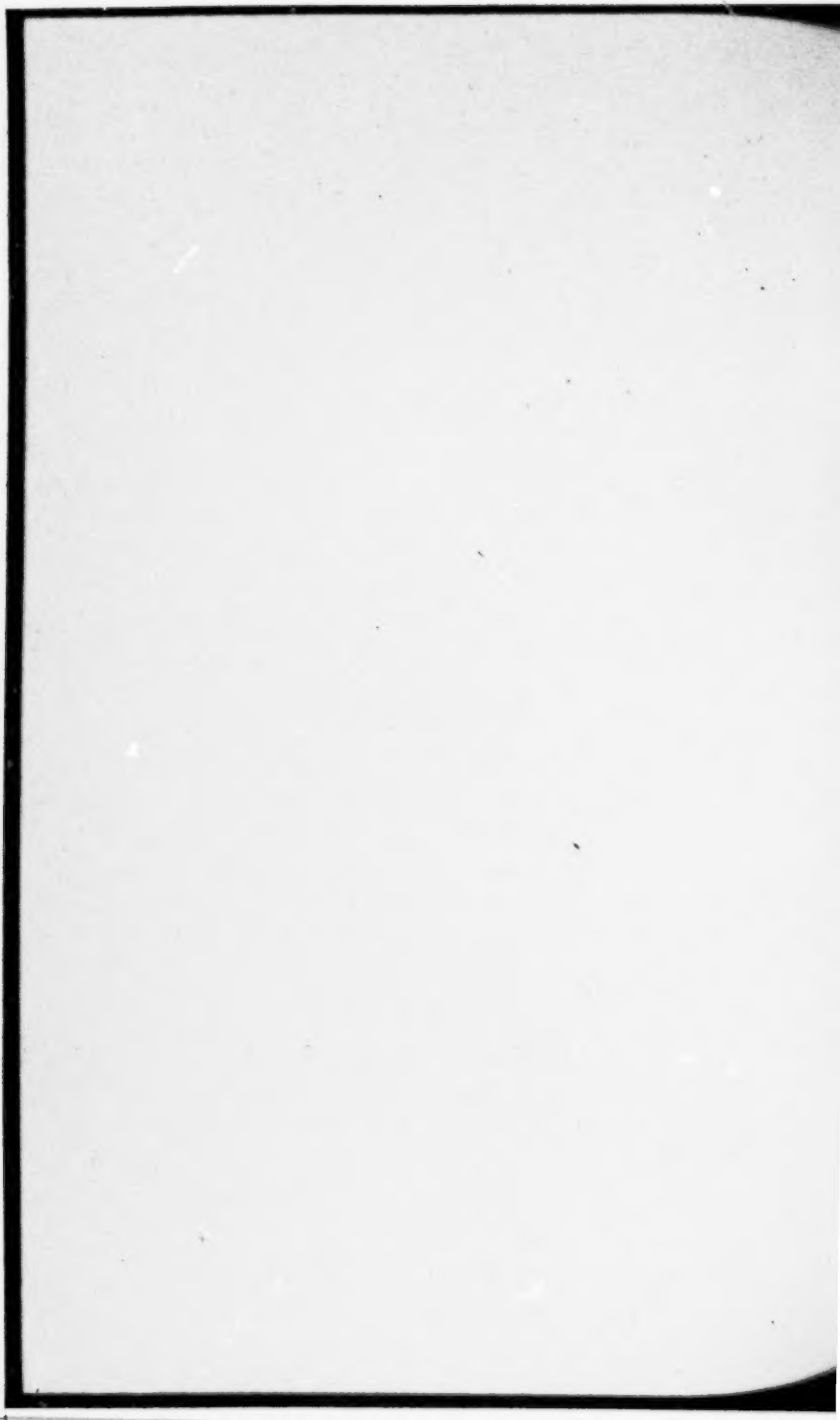
THE GARLOCK PACKING COMPANY,
Petitioner,

against

J. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE LINK, JR.,
Counsel for Petitioner,
17 John Street,
New York City 7,
New York.



INDEX

CASES CITED

STATUTES CITED

Supreme Court of the United States

OCTOBER TERM, 1946

No. _____

THE GARLOCK PACKING COMPANY,

Petitioner,

against

J. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, The Garlock Packing Company, respectfully prays that a Writ of Certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, which reversed a judgment of the United States District Court, Southern District of New York, Clancy, D. J., in favor of the petitioner.

Opinion

The opinion, findings of fact and conclusions of law of the United States District Court for the Southern District of New York, appear on Pages 29 to 33 inclusive of the Transcript of Record and the opinion of the Circuit Court

of Appeals which was written for reversal of the District Court's opinion by Judge Clark and Judge Swan reluctantly concurring 159 F. 2d 44, October Term, 1946 (R. pp. 40 to 46).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended, 28 U. S. C. A., Section 347, et seq. The decision of the Circuit Court of Appeals was rendered on the 16th day of January, 1947. The time to apply for this Writ expires on April 16th, 1947.

The Question Before the Court

Do dividends paid to the plant employees of The Garlock Packing Company, on an allocated number of shares of its common stock, at the same rate and at the same time that the common stockholders of The Garlock Packing Company are paid dividends upon its common stock, constitute a part of the plant employees' regular rate of pay, as such term is used in Section 7 (a) (3) of the Fair Labor Standards Act of 1938?

The common stock so allocated to the plant employees is not paid for or owned by the plant employees. It may be designated as imaginary common stock.

The plan was put into effect prior to the enactment of the Fair Labor Standards Act of 1938.

Statutes Involved

The Federal statutes involved are the Fair Labor Standards Act (c. 676, 52 Stat. 1060, 29 U. S. C. sec. 201).

The particular sections involved in this proceeding are:

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employ-

ees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed.

Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14.

Sec. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes, approved October 15, 1914, as amended (U. S. C. 1934 edition, title 28, sec. 381), to restrain violations of section 15."

Statement

This action was instituted by the respondent, the Administrator of the Wage and Hour Division, United States Department of Labor, without any request or suggestion from The Garlock Packing Company employees under Section 17 of the Fair Labor Standards Act of 1938 to enjoin the petitioner, The Garlock Packing Company from violating the overtime provisions of the act. After a trial, the United States District Court for the Southern District of New York, John W. Clancy, United States District Court Judge, entered a judgment denying the injunction and dismissing the complaint (Rec., p. 34).

The respondent, the administrator, appealed to the United States Circuit Court of Appeals. The United States Circuit Court of Appeals reversed the decision of the United States District Court on January 16, 1947 (Rec., p. 40, Circuit Court Judge T. W. Swan reluctantly concurring, Rec., p. 40).

The Garlock Packing Company manufactures and sells mechanical packings. Mechanical packings are made from rubber, asbestos, metal and various fibres. The number of The Garlock Packing Company's employees varied from 1936 to 1945 from a minimum of 950 to a maximum of 2026 (Rec., p. 23).

These hourly paid plant employees were paid an hourly base rate and in addition, a production incentive bonus, amounting to approximately 25% of the hourly base rate (Rec., fol. 84). The Garlock Packing Company's hourly paid plant employees for work in excess of the hours mentioned in the statute were paid one and one-half times the base rate and the production incentive bonus. They were both deemed to be the hourly plant employees' "regular rate" as such words are used in the statute (Rec., p. 28).

Prior to 1929, many employers encouraged their employees to purchase capital stock of their employer. Various types of purchase plans were adopted. The policy was deemed to be and they were a splendid forward-looking step in maintaining good employee-employer relations. These plans received a serious set-back when the depression of the early thirties took place. Employee earnings were reduced. The capital stock of their employer which they had acquired could only be sold at a loss. Employees lost a substantial part of their nest egg. In 1937, the country was still in the throes of the depression. The Fair Labor Standards Act of 1938 was unknown. The Garlock Packing Company set up an imaginary stockholding plan which gave to the employees many advantages of a stockholder without any financial obligation on the part of the employee.

Circuit Judge Swan's description of the plan is as follows:

> "The defendant's plan for 'wage premiums' to be measured by 'imaginary stockholdings' was put into operation before the passage of the Fair Labor Standards Act of 1938. The announcement to the employees stated that the plan was to take the place of the company's former practice of extending 'courtesies to you in the form of a picnic allowance

at mid-year and a Christmas gift at approximately the year end and in other ways.' At the time of the adoption of the plan the plant employees were paid a base hourly rate plus a production incentive bonus of approximately 25% of the hourly rate. After enactment of the Fair Labor Standards Act the company has paid time and one-half upon these amounts for all overtime. In addition, it has paid 'imaginary dividends' to employees who are still in its service on (fol. 47) the quarterly dividend date but has not included these payments in figuring overtime. *If free to do so, I would treat the 'imaginary dividend' as being a voluntary donation, like a Christmas gift, rather than a part of the employee's 'regular rate' of pay*" (Rec., pp. 44 and 45). Emphasis ours.

Imaginary stockholdings were allocated to the employees on the following basis:

"The plan may be withdrawn, modified or amended at any time by the Company. A cash dividend of seventy-five cents the share will be paid on the common stock of the Company on Wednesday, June 30 next. The amounts of wage premiums payable on or about that date to individual eligible employees appear in the table below:

Prior Service	*Share Basis*	*Wage Premium*
6 months	5 shares	$ 3.75
1 year	10 shares	7.50
2 years	15 shares	11.25
3 years	20 shares	15.00
4 years	25 shares	18.75
5 years	30 shares	22.50
6 years	35 shares	26.25
7 years	40 shares	30.00
8 years	45 shares	33.75
9 years or more	50 shares	37.50

> In the future and until such time as the plan may be withdrawn, modified or amended, the above share basis will govern the distribution of wage premiums to employees in each classification. If by chance the status of the Company's affairs permits the payment of a cash dividend greater than seventy-five cents the share in any quarter, the wage premiums will be increased accordingly. On the other hand, in the event that a lesser cash dividend is necessary at any time, the amounts of the wage premiums in any classification will be proportionately decreased (Rec., p. 17)."

The dividends paid upon these imaginary stockholdings varied from 25¢ a quarter and ran as high as $1.25 a quarter, averaging approximately 50¢ a quarter (Rec., p. 27).

Reasons for Granting the Writ

The decision of the Circuit Court of Appeals in The Garlock Packing Company case conflicts with:

(a) The decision of the United States District Court in *Walling* v. *Frank Adam Electric Company*, Eastern District of Missouri and reported in 66, Federal Supplement at page 811, in which, under a less favorable state of facts, held that a 10 percent bonus payment was not part of the "regular rate" of pay.

(b) A decision of the United States District Court, for the District of Massachusetts, *Walling* v. *Bauch Machine Tool Company*, copy of which is annexed hereto and marked Exhibit "A", in which a production bonus paid monthly was held not to be part of the "regular rate."

(c) The interpretation of the words "regular rate" conflicts with the prior decisions of the United States Supreme

Court, to wit: *Walling* v. *Belo*, 316 U. S. 624; *Walling* v. *Youngerman-Reynolds Hardware Co.*, 325 U. S. 419.

(d) The Supreme Court should review the United States Circuit Court's definition of the words "regular rate" as applied to bonus plans, pension plans, profit sharing plans, etc. This decision has created considerable confusion and doubt as to the advisability of continuing similar plans. Some employers have abandoned similar plans. Many employers are awaiting the decision of the United States Supreme Court upon The Garlock Packing Company case, this case, before deciding upon their future policy. This decision may have, in the words of the Court in the case of *Walling* v. *Frank Adam Electric Company, supra:*

> "the effect of suddenly and effectively killing the goose that had been laying the golden eggs."

The confusion that exists is apparent from the public statement made by the Administrator:

> "We do not know yet, I think—although some of my lawyers are already having doubts in view of some recent decisions of the Supreme Court—whether that rule will be accepted and whether such a quarterly test is a valid exercise of administrative discretion. Of course, if the Court subsequently changes that and says that we mush consider it whether it is paid quarterly or not, naturally I would have to modify my position; but in accordance with our usual custom, we would not modify it for our purposes retroactively. We would put you on notice as to the future."

(e) The decision in The Garlock Packing Company case places employers in a situation similar to that created by the decision in the now famous Mt. Clemens Pottery case. It may create windfall rights of monumental proportions. A decision of such importance to employee and employer should be reviewed by the Supreme Court.

(f) The decision in The Garlock Packing Company case violates the intention of Congress which was not to include certain types of bonus payments in the definition of the words "regular rate."

(g) The decision of the United States Circuit Court of Appeals defines "regular rate" broader than the definition of the Administrator and conflicts therewith. The reason

(a) The dividend paid to The Garlock Packing Company employees upon their imaginary stockholdings was voted by the Board of Directors periodically.

(b) The voting of the dividend was discretionary.

(c) The payment of the dividend was discretionary. It could be discontinued or withdrawn at any time.

The general ruling of the Administrator is as follows:

"We finally about a year ago, adopted this administrative test which we have been applying. First of all, the question arises as to whether the bonus is a part of the regular rate of pay and whether it is a discretionary one which may be withdrawn by the employer.

If it is, in fact, truly discretionary, then it does not have to be considered as a part of the regular rate of pay and that is, of course, a question of fact in each case and all of the circumstances will be taken into consideration, such as how often it is paid, over how long a period of time without interruption, whether the board votes specifically on it periodically and so on.

The administrative position which we took is that where the bonus is nondiscretionary but is paid not more frequently than quarterly, we shall not for our purposes require that that be taken into account as a part of the regular rate of pay for overtime purposes."

Under the Administrator's published definition and ruling these imaginary dividend payments were not part of the "regular rate".

(h) The dividend payments upon the imaginary stockholdings are in reality, discretionary Christmas bonuses, paid approximately four times a year and are not part of the "regular rate."

The dividend payments made upon the imaginary stockholdings of the hourly paid plant employees of The Garlock Packing Company are not part of the hourly plant employees' "regular rate" and should not be included in the computation of overtime payments.

For the reasons set forth in the accompanying brief, the decision of the Circuit Court of Appeals for the Second Circuit, should be reversed.

WHEREFORE, your petitioner respectfully requests the issuance of a Writ of Certiorari.

Dated: March 28, 1947.

Respectfully submitted,

GEORGE LINK, JR.,
Counsel for the Petitioner,
17 John Street,
New York City 7,
New York.

Supreme Court of the United States

OCTOBER TERM 1946

No. .....

THE GARLOCK PACKING COMPANY,

Petitioner,

against

J. METCALFE WALLING, Administrator of the Wage and Hour Division, United States Department of Labor,

Respondent.

PETITIONER'S BRIEF

POINT I

The "imaginary" dividend paid by the Garlock Packing Company to its plant employees does not constitute a part of their regular rate of pay.

For some years prior to 1929, it was the policy of many companies to invite, upon some easy payment plan, their plant employees to purchase their stock. The plan worked splendidly with successful companies. Then came the depression. Employees' incomes were substantially reduced. Their capital savings invested in their employers' capital stock were seriously impaired. When these employees

needed their nest egg the most its value was the least. The executives of The Garlock Packing Company began studying ways and means of accomplishing this same purpose without any capital investment upon the part of their employees. The Garlock Packing Company's imaginary dividend plan was finally decided upon in June, 1937, as the ideal solution. This was prior to the enactment of the Fair Labor Standards Act of 1938. It was undertaken during the period of the country's greatest depression. Many millions were unemployed. Garlock's employees were reduced in number. At the time of the adoption of the imaginary stockholding plan, Garlock's plant employees were paid a base hourly rate plus incentive production bonuses. Beginning with the enactment of the Fair Labor Standards Act The Garlock Packing Company paid time and one-half upon these amounts for all overtime.

The Garlock Packing Company had the power to withdraw, modify or amend the plan at any time. The Garlock Packing Company's directors had the power to pass a dividend and by passing a dividend, to pass the bonus payment. The amount of the bonus could not be determined until the directors acted and declared a dividend upon the issued and outstanding capital stock, months after the employees had received payment for their work. The amount of the dividend could only be computed after the dividend was actually declared. To receive the dividend, the employee had to be in the employ of The Garlock Packing Company at the time of the declaration of the dividend.

The Garlock Packing Company declared dividends upon its common stock on a quarterly basis. From the inception of the plan until the date of the trial, the dividends upon the common stock varied as follows:—25¢, 50¢, 75¢, $1.00 and in one instance, $1.25. The dividend payments to the employees were limited to cash dividends. Stock dividends or dividends in any other form were excluded.

It is a well-established rule of law that the power to pay dividends upon common capital stock of a corporation, with few and rare exceptions, is within the discretion of the Board of Directors of the Corporation and will not be interfered with by the Courts. (See *New York Lake Erie & Western Railroad* v. *Nickals*, 119 U. S. 296, 7 S. Ct. 209.)

The Garlock Packing Company which is a New York Corporation is subject to the Stock Corporation Law of the State of New York.

> "Sec. 58. Dividends. No stock corporation shall declare or pay any dividend which shall impair its capital, nor while its capital is impaired, nor shall any such corporation declare or pay any dividend or make any distribution of assets to any of its stockholders, whether upon a reduction of the number or par value of its shares or of its capital, unless the value of its assets remaining after the payment of such dividend, or after such distribution of assets, as the case may be, shall be at least equal to the aggregate amount of its debts and liabilities. including capital. In case any such dividend shall be paid, or any such distribution of assets made, the directors in whose administration the same shall have been declared or made, except those (1) who may have caused their dissent therefrom to be entered upon the minutes of the meetings of directors at the time or (2) who having been absent when such action was taken may have communicated in writing their dissent to the secretary or caused their dissent to be entered on the minutes within a reasonable time after learning of such action, or (3) who affirmatively show that they had reasonable grounds to believe, and did believe, that such dividend or distribution would not impair the capital of such corporation, shall be liable jointly and severally to such corporation and to the

creditors thereof to the full amount of any loss sustained by such corporation or by its creditors respectively by reason of such dividend or distribution."

The dividends paid under the imaginary stockholding plan of The Garlock Packing Company have no relation to the hourly base wage or to the incentive production bonuses paid to The Garlock Packing Company employees.

There is no presumption that the dividends were paid from current earnings.

The directors have the right to declare dividends from the earned surplus of the corporation.

Judge Swan in his reluctant concurrence, wrote as follows:

"The defendant's plan for 'wage premiums' to be measured by 'imaginary stockholdings' was put into operation before the passage of the Fair Labor Standards Act of 1938. The announcement to the employees stated that the plan was to take the place of the company's former practice of extending 'courtesies to you in the form of a picnic allowance at mid-year and a Christmas gift at approximately the year end and in other ways.' At the time of the adoption of the plan, the plant employees were paid a base hourly rate plus a production incentive bonus of approximately 25% of the hourly rate. After enactment of the Fair Labor Standards Act the company has paid time and one-half upon these amounts for all overtime. In addition, it has paid 'imaginary dividends' to employees who are still in its service on the quarterly dividend date but has not included these payments in figuring overtime. If free to do so, I would treat the 'imaginary dividend' as being a

voluntary donation, like a Christmas gift, rather than a part of the employee's 'regular rate' of pay. But since authoritative decisions appear to preclude so treating them, I reluctantly concur in the result of my brothers' opinion."

What Mr. Justice Murphy said in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, loc. cit. 424, 427, 65 S. St. 1242, 1244, 1250, 89 L. Ed. 1705, 1711, is pertinent:

"The keystone of Section 7 (a) is the regular rate of compensation. On that depends the amount of overtime payments which are necessary to effectuate the statutory purposes. The proper determination of that rate is therefore of prime importance.

"As we have previously noted, the regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed. Citing Walling v. Helmerich & Payne, 323 U. S. 37, loc. cit. 40, 65 S. Ct. 11, 89 L. Ed. 29; United States v. Rosenwasser, 323 U. S. 360, 363, 65 S. Ct. 295, 89 L. Ed. 301."

In *Walling* v. *Helmerich & Payne*, 323 U. S. 37, at page 41, 65 S. Ct. 11, the Supreme Court stated:

"While the words 'regular rate' are not defined in the Act, they obviously mean the hourly rate actually paid for the normal overtime workweek."

In *Walling* v. *Belo Corporation*, 316 U. S. 624, at page 634, 62 S. Ct. 1223 at 1228, this Court refused to provide a rigid definition of "regular rate". The language of the court is as follows:

"The problem presented by this case is difficult—difficult because we are asked to provide a rigid

definition of 'regular rate' when Congress has failed to provide one. Presumably, Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable and that which it was unwise for the Congress to do, this Court should not do."

POINT II

The decision of the United States Circuit Court of Appeals conflicts with the official interpretation of the Administrator.

The Garlock Packing Company had the right to rely upon the official statement of the Administrator in interpreting the words "regular rate". *Fleming* v. *Huebsch*, U. S. C. C. A. 7th Cir., Evans, C. J. February 3, 1947.

Under the Garlock plan:

(1) The imaginary dividends were discretionary;

(2) The imaginary dividends were voted periodically by the Board of Directors;

(3) The Board of Directors could not be compelled by any legal process to pay such dividends.

These conditions take the payments out of the Administrator's definition of a "regular rate".

On February 13, 1946, the Administrator delivered an address at the meeting of the New York City Control, Controllers Institute of America. The following question was put in writing to Mr. L. Metcalfe Walling, the Administrator:

"An employee is paid a base pay plus incentive compensation. Many years ago the company adopted a policy of paying its employees a dividend whenever

the board of directors paid a dividend upon its stock. For this purpose, the employees were given a phantom number of shares of stock based on their length of service. The board reserves the right to discontinue the plan at any time. Are these dividend payments made to employees to be treated as part of their compensation in making overtime payments? The dividends when paid are paid quarterly. An employee with ten years of service would be allocated ten shares of the phantom stock. For the purposes of the dividend, each share of phantom stock receives the same dividend as a share of the common stock of the company."

The Administrator answered as follows, which answer conforms to the Administrator's Bonus Rulings issued February 5, 1945:

"My first somewhat irreverent reaction is this is too complicated. You had better abandon it and do something simpler, but it gives me a good opportunity to explain what I think is in the mind of the questioner about our so-called bonus rule which has been a problem with us, as I am sure it has been with you, for some time.

We finally, about a year ago, adopted this administrative test which we have been applying. First of all, the question arises as to whether the bonus is a part of the regular rate of pay and whether it is a discretionary one which may be withdrawn by the employer.

If it is, in fact, truly discretionary, then it does not have to be considered as a part of the regular rate of pay and that is, of course, a question of fact in each case and all of the circumstances will be taken into consideration, such as how often it is paid, over how long a period of time without interruption,

whether the board votes specifically on it periodically and so on.

The administrative position which we took is that where the bonus is nondiscretionary but is paid not more frequently than quarterly, we shall not for our purposes require that that be taken into account as a part of the regular rate of pay for overtime purposes.

That was largely because of bookkeeping problems, plus the fact that it seemed to us that pretty generally if your bonus was not paid more frequently than quarterly, it did not have that regularity which we think the statute intends compensation to have if it is a part of the regular rate of pay.

We do not know yet, I think—although some of my lawyers are already having doubts in view of some recent decisions of the Supreme Court—whether that rule will be accepted and whether such a quarterly test is a valid exercise of administrative discretion. Of course, if the court subsequently changes that and says that we must consider it whether it is paid quarterly or not, naturally I would have to modify my position; but in accordance with our usual custom, we would not modify it for our purposes retroactively. We would put you on notice as to the future."

POINT III

The imaginary dividend has no relation to employee's production or pay.

The plan set forth on page 6 hereof shows that it has no relation to employee's production or pay. Of two employees doing the same work and receiving the same pay the imaginary dividend of a six months employee is $3.75, a nine year employee is $37.50, ten times greater.

The inclusion of the imaginary dividends in the "regular rate" favors the employees who are in the employ of the employer UPON THE DATE OF THE DECLARATION OF THE DIVIDEND.

It must be assumed that Congress intended that all employees of a company should be treated equally in the application of the "regular rate". That it should not be defined so as to bring about an unequal result. The decision of the Court below favors those employees who were in the employ of the employer on the dividend date. An employee not in the employ of the employer on the dividend date, although rendering the same service does not participate, although all other conditions of employment are the same.

POINT IV

The Circuit Court's decision if sustained will kill the goose that lays the golden eggs. It will create another Mount Clemens Pottery situation.

The total number of employees who received the average quarterly imaginary dividend and the average quarterly additional overtime pay to which they would be entitled under the Circuit Court's decision, is as follows:

1.	2.	3.	4.	5.	6.	7.	8.
				Average Quarterly Additional Overtime Pay When Dividend Included in Regular Rate			
Year	Total No. of Employees Who Received Imaginary Dividends	Total Imaginary Dividend Paid	Average Quarterly Imaginary Dividend Per Employee	2 Hours Overtime Per Week	4 Hours Overtime Per Week	6 Hours Overtime Per Week	8 Hours Overtime Per Week
1937 (3 q's)	630	$40,612.50	$21.48	$.51	$.97	$1.40	$1.79
1938	531	27,682.50	13.03	.31	.59	.85	1.08
1939	584	50,490.00	21.61	.51	.98	1.41	1.80
1940	658	70,851.25	26.92	.64	1.22	1.76	2.24
1941	839	71,627.50	21.34	.51	.97	1.39	1.77
1942	1033	78,382.50	18.97	.45	.86	1.24	1.58
1943	1126	53,275.00	11.83	.28	.54	.77	.98
1944	1214	56,615.00	11.66	.28	.53	.76	.97
1945 (3 q's)	1240	45,209.50	12.15	.29	.55	.79	1.01

Months after the participating employees' daily and weekly task is done, The Garlock Packing Company's accounting staff, would under the Circuit Court's ruling, if the plan is continued, be required to recalculate retroactively each of the participating employees' daily and weekly hourly and incentive rates by adding thereto, the infinitesimal amounts above mentioned. This task would require approximately 400,000 separate calculations—from a practical operating standpoint—a physically impossible task. The cost of making the calculations would be more than the imaginary dividend.

POINT V

Walling v. _Richmond Screw Anchor Company_, 154 Fed. (2d) 780 distinguished. It does not apply to payments similar to Christmas bonuses paid not more frequently than four times a year.

The cases upon which the Government relies, are cases in which there was a base rate of pay plus an incentive bonus. Time and one-half was not paid on incentive bonus.

The Garlock Packing Company paid a base rate, plus an incentive bonus of approximately 25%. Garlock's employees received time and one-half upon these payments when they worked in excess of the hours provided in the statute. The dividend paid had no relation to the compensation paid to the employee for the services rendered by him. The plan was, among other things, adopted as a substitute. The announcement states:

> "For several years and from time to time the company has extended certain courtesies to you in the form of a picnic allowance at mid-year and a Christmas gift at approximately the year end and in other ways. These things I think have served their purpose well as means of expressing on occasion the good will of the Company" (T. R., p. 14, fol. 41).

In the *Walling* v. *Richmond Screw Anchor Company* case, a monthly bonus of 10% was paid on the base compensation. The record of the bonus amounts earned weekly by individual employees was kept. The bonus was a part of the employee's actual and regular compensation. Bonuses of this type are part of the regular rate of pay. They were so treated by The Garlock Packing Company. The Garlock Packing Company paid time and one-half upon such bonuses for all work in excess of the period mentioned in the statute. The dividend paid upon an imaginary number of assigned shares, to the employees entitled thereto under the plan, was not credited to them until the actual dividend date. No participant who was not in the employ of Garlock on the dividend date was entitled to receive the imaginary dividend. The Garlock Packing Company's imaginary stock plan was intended and does accomplish its purpose of making the employees coming within the plan, imaginary stockholders with the interest of stockholders but without any financial risk.

In the case of *Walling* v. *Frank Adam Electric Company*, 66 Federal Supplement 811, the Court in distinguishing the facts in that case, stated at page 814:

> "The plaintiff contends that this case is on all fours with Walling v. Richmond Screw Anchor Co., 2 Cir. 154 F. 2d 780, 781, decided March 8, 1946. In the Richmond Screw case the defendant provided by resolution on April 3, 1943, that:
>
> > 'All of the company's employees, with the exception of the finishers in the so-called snap-ty department, should be paid a monthly bonus, in war stamps, of 10 per cent of their weekly base salaries, for the previous month, commencing in June 1942.'
>
> "In that case the resolution provided for the payment of bonuses for each month in the future, and not in the past, and was not subject to any further action by the Board. Of course, such a bonus, where it is fixed, is a part of the regular rate of compensation."

POINT VI

The statute is a highly penal one and should not be enlarged by judicial interpretation.

The penal sections of the statute are as follows:

> "Sec. 16. (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000 or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.
>
> (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Congress did not give the Administrator of the Wage and Hour Division the right to define "regular rate." Congress itself did not define it.

The late Mr. Justice Stone, in *Walling* v. *Belo Corporation*, 316 U. S. page 634, stated as follows:

> "The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably, Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable and that which it was unwise for the Congress to do, this Court should not do."

The Court has again and again refused to enlarge the words of a penal statute and place a strained construction thereon so as to embrace by judicial construction an innocent act into a criminal one. See *Prussian* v. *United States*, 282 U. S. 675.

POINT VII

The income tax rules and regulations and Social Security tax laws are not material to the issue.

The Administrator concedes in his releases that Christmas bonuses are not part of the "regular rate."

The Social Security Board has ruled that social security taxes must be paid upon Christmas bonuses. The ruling is as follows:

> "Amounts distributed to regular employees at Christmas equal to a percentage of their monthly salaries are taxable wages because they are paid in connection with, and as a result of, the employment relationship. The fact that the amounts are not based on the quality of the employees' work or length of service is immaterial. (Digest S.S.T. 251; 1938-4-9164. 1-24-38.)"

The Social Security Board has also ruled that payments made by a company of the difference between the employee's normal earnings and the amount received from the State for National Guard duties are subject to the social security tax. S. S. T. 49; XV 42-8355, 1936.

In *Indianapolis Glove Co.* v. *United States,* 96 F. 2d 816, the facts were that in 1925 a company offered employees stock at par value, below market price and took notes for payment with the understanding that the notes would not be collected but would be paid by the dividends on the stock. This was held to be a bonus and additional compensation for income tax purposes.

It follows that the fact that The Garlock Packing Company paid social security taxes, etc., does not carry any weight in determining, as a question of fact, whether the payments made to The Garlock Packing Company employees, under the dividend plan, constituted a part of the employees' "regular rate."

CONCLUSION

The writ of certiorari should be granted.

Dated: New York, March 28, 1947.

Respectfully submitted,

George Link, Jr.,
Counsel for the Petitioner,
17 John Street,
New York City 7,
New York.

APPENDIX

Exhibit "A"

Decision of U. S. District Court of Massachusetts in Case of *Walling* v. *Bauch Machine Tool Company*.

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 2410

L. METCALFE WALLING,
Administrator,

v.

BAUCH MACHINE TOOL COMPANY.

FACTS.

March 31, 1944

HEALEY, J.

The facts are stipulated, and a Stipulation of Facts has been filed. They are substantially these:

This is an action brought by L. Metcalfe Walling, the Administrator of the Wage and Hour Division of the United States Department of Labor, against a Massachusetts corporation, to enjoin the defendant from violating the provisions of sections 15 (a) (1): 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938, hereinafter referred to as the Act.

Appendix.

The defendant is admittedly subject to the provisions of the Act, since the employees of the defendant are engaged in the production of goods for interstate commerce.

The employees regularly worked more than 40 hours per week. On March 12, 1942, the defendant entered into a written agreement with the National Association of Machinists, hereinafter referred to as the Union, whereby the defendant recognized the Union as the sole bargaining agency in respect to rates of pay, wages, hours, and working conditions for all employees with certain exceptions not here important. It was to continue in full force and effect for a period of one year, and provided that a wage scale agreement which was to be thereafter entered into by representatives of the Union and the defendant, was to be included therein. A memorandum of understanding was entered into by the defendant and the union on April 23, 1942, and provided among other things, for reopening the wage scale agreement upon production reaching a certain point for two consecutive months. Subsequently, in substitution for the provision, the defendant and the Union entered into a bonus plan as of July 1, 1942, whereby all employees were to receive bonuses each month in which production reached a specified amount. The amount of the bonuses varied according to the production of the plant for the month. The bonus was an incentive bonus adopted for the purpose of increasing production and the employees were entitled to it by virtue of the Union agreement. The agreement provided bonuses to each employee as follows:

$10 if monthly production amounted to $350,000.
$26 if monthly production amounted to $400,000.
$40 if monthly production amounted to $450,000.
$58 if monthly production amounted to $500,000.

Appendix.

In the case of any employee who was absent for one or more days, a proportionate deduction was made from his share of the bonus, purely on a straight per diem basis. However, neither the amount of the individual employee's bonus as originally computed, nor the amount of deductions for absence, is related in any way to the number of hours worked per week. Employees leaving during the month forfeited any share in the bonus. New employees shared proportionately to the days worked. Bonuses were paid in accordance with the plan for the months of August, October and November, 1942, and February and March, 1943. All of the bonuses were in addition to the hourly rates of pay as carried on the company's books, with time and a half for overtime. The bonus was always disregarded in computing overtime compensation for the employee.

At the time that this bonus arrangement was first instituted, neither the Union nor the company contemplated that the Wages and Hours Division would claim that the bonus payments should be included in computing the regular hourly rates of pay of defendant's employees for the purpose of determining their overtime compensation under the Act.

In April, 1943, an inspection of the Wages and Hours Division, conducting an inspection of the Wage and Hour records of the company, called the company's attention to the position of the Division that the bonus should be so included in computing the employee's regular hourly rate of pay. The defendant expressed to the Union in April, 1943, its willingness to modify its bonus plan so as to provide, at no greater cost to it than under the plan of July 8, 1942, bonuses to employees which should not be at the same amount to all employees, but which should represent additions to their regular hourly rates

of pay and would accordingly, vary with the hours of work of each employee. The Union, however, preferred that all payments to employees not absent from their duties for any day during a month should be equal irrespective of the hours worked by individuals. Thereupon, the Union and the company, who at that time were engaged in negotiating a new contract, provided in that contract for the continuance of the bonuses on the same basis as before, but added the following provision:

> "It is agreed that the bonuses herein provided are for the joint efforts of all employees and are not based on the special skills or hours of labor of individual employees and are not intended to affect their regular rate of pay. If, nevertheless, any bonuses paid under the plan are to be deemed to increase the regular rates of pay of the employees by whom they are received, the increase to each individual employee shall be considered to be the amount of the bonus divided by the number of hours of labor performed by such employee during the period for which bonus is paid, counting overtime hours in any week as one and one-half hours each, so that the total compensation due any employee under said bonus plan shall not exceed the amounts herein provided and, shall remain precisely equal to that paid to every other employee."

In April, 1943, the Union addressed an undated letter to the president of the defendant company, which read as follows:

> "The bonus plan adopted by Bauch Machine Tool Company on July 8, 1942, was a result of an agreement with the International Association of Machinists, acting as collective bargaining agents for all em-

ployees of the Company, and the provisions of the plan were by that agreement substituted for paragraph 4 of the existing contract between the Company and the Union dated April 23, 1942.

"All parties intended to provide by said bonus plan a method of rewarding employees for the results of their joint efforts which should not depend upon the importance of their individual contributions or be measured by the hours of labor or the regular rates of compensation of any individual employees. Its purpose was not to provide increases in the regular rates of pay of individual employees, in which event such increases would have been graduated in accordance with the special skills and hours of labor of the individuals involved, but to reward teamwork and faithful attendance, in the absence of which teamwork must fail. Since the contribution of each employee to teamwork should be as important as that of any other, it was agreed that every employee should share equally in the reward for the increased production which might flow from it. The bonus plan did not, therefore, affect the regular rates of compensation of any individual employees."

The plaintiff contends that this letter is inadmissible on the ground that it is irrelevant, immaterial and hearsay, and is objectionable under the parol evidence rule since it purports to interpret the earlier written agreement, which the plaintiff contends is not ambiguous, and also for the reason that it contains conclusions of law.

Appendix.

CONCLUSIONS OF LAW.

1. The undated letter from the "Union" to the president of the defendant is inadmissible, and is excluded, since it is a statement out of court, and cannot be construed as an admission by the plaintiff of any one in privity with the plaintiff.

2. By the agreement between the Union and the defendant entered into after notice from the Wages and Hours Division, the Union and the defendant agreed in part that the "bonuses herein provided are for the joint efforts of all employees and are not based on the special skills or hours of labor of individual employees and are not intended to affect their regular rates of pay." When an employer and its employees, or their bargaining agency, have agreed upon an arrangement which has proven mutually satisfactory, a court should not upset it and "approve an inflexible and artificial interpretation of the Act which finds no support in its text—." *Walling* v. *Belo,* 316 U. S. 624, 634. The bonuses were not compensation for individual efforts of individual employees, nor even for effort of a group or groups of employees, but rather for the combined efforts of all of the defendant's employees. Bonuses, when paid, were paid equally to all employees, and had no relation to individual accomplishment, hours worked or hourly rates paid. The bonuses were irregular, contingent and fluctuating. They could be computed only at the end of each month. I conclude that such bonuses should not be a part of the regular rate of pay of the employees for the purpose of computing overtime compensation under the Act.

3. At least at no time subsequent to the time of the agreement referred to in Conclusion No. 2, there were violations of Section 15 (a) (1), (2), and (5) of the Act, the violations were in good faith and without any belief on the part of the defendant that it was guilty of wrong doing. If there were such violations they should not be the basis of an injunction, since they were in good faith, and since what the defendant had done since the agreement referred to in Conclusion No. 2 is not in violation of the Act.

5. I, therefore, find for the defendant, deny the plaintiff's prayer for injunction, and direct the entry of judgment for the defendant.